

Summary: The plaintiff filed a motion to vacate judgment, arguing that the Court committed fraud and misrepresentation by entering its order granting the defendant's motion to dismiss without taking into account the plaintiff's amended complaint. The Court denied the plaintiff's motion, finding that no exceptional circumstances exist under Rule 60(b), and that the plaintiff cannot attempt to use a Rule 60(b) motion as a substitute for a timely appeal.

Case Name: Kunzer v. Magill

Case Number: 09-1950 DSD/FLN

Docket Number:

Date Filed: 2/19/2010

Nature of Suit:

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Kenneth R. Kunzer,)	
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION TO VACATE JUDGMENT
vs.)	
)	
Frank J. Magill, Jr.,)	Case No. 09-1950 DSD/FLN
)	
Defendant.)	

I. BACKGROUND

On July 22, 2009, the plaintiff, Kenneth R. Kunzer, *pro se*, petitioned this Court to pursue criminal charges against the former United States Attorney, Frank J. Magill, Jr., by appointing a judge to file a criminal complaint prepared by Kunzer. See Docket No. 1. On October 29, 2009, this Court issued an "Order Granting Defendant's Motion to Dismiss." See Docket No. 25. The Court found that Kunzer lacked standing to request that criminal action be brought against any person, and that even if standing did exist, the United States Attorney has absolute immunity in connection with the discretionary decision of whether to initiate criminal charges. On October 29, 2009, judgment

was entered accordingly. See Docket No. 26.

On January 13, 2010, Kunzer filed a “Notice of Motion and Motion to Vacate Judgment” pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. See Docket No. 42. Kunzer states, in part:

1. Pursuant to Fed. R. Civ. P. 15(a) Judge Hovland has a ministerial duty to enter a ruling on plaintiff’s October 13, 2009 amended complaint/petition, which was amended as a “matter of course.” (Docket No. 22-1).

2. This fraud and misrepresentation consisted of Judge Hovland’s refusal to rule on Plaintiff’s amended complaint, dated October 13, 2009.

3. Judge Hovland acted without power and/or authority, to wit, in the clear absence of jurisdiction, when he entered his October 29th, 2009 Order, Granting Defendant’s Motion to Dismiss.

4. This fraud is evidenced by the record and proceedings and the affidavit of Kenneth R. Kunzer.

5. Plaintiff has been denied his Constitutional 5th Amendment right of due process and equal protection.

Wherefore, Plaintiff moves the court in the above-entitled action to vacate and set aside the Judgment entered in this action on October 29, 2009, on the ground of fraud and misrepresentation; rule on all motions; allow discovery in this matter; and set the case for trial 12 months from the date of this order.

See Docket No. 42.

II. LEGAL DISCUSSION

A party may seek relief from a judgment or order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). “The rule ‘provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.’” Jones v. Swanson, 512 F.3d 1045, 1048 (8th Cir. 2008) (quoting United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986)). A district court has broad discretion in determining whether to award relief under Rule 60(b). Jones, 512 F.3d at 1048.

On October 19, 2009, Kunzer filed a “Notice of Amended Complaint” and “Amended Petition in the Nature of a Motion for Hearing to Appoint a Judge Pro Tem to Act as Attorney to Prosecute U.S. Attorney.” See Docket Nos. 22 and 22-1. Kunzer contends that he had a right to amend his petition as a matter of course pursuant to Rule 15 of the Federal Rules of Civil Procedure. Rule 15 allows a party to amend its pleading once as a matter of course “(A) before being served with a responsive pleading; or (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.” Fed. R. Civ. P. 15(a)(1).

Kunzer argues that the fraud and misrepresentation consisted of the Court’s refusal to rule on his amended complaint, that the Court acted without power and/or authority when it entered its order granting the Defendant’s motion to dismiss, and that he was denied his Fifth Amendment right of due process and equal protection. “To prevail on a motion under Rule 60(b)(3), the movant must show, with clear and convincing evidence, that the opposing party engaged in a fraud or

misrepresentation that prevented the movant from fully and fairly presenting its case.” Atkinson v. Prudential Prop. Co., Inc., 43 F.3d 367, 372-73 (8th Cir. 1994) (citing Paige v. Sandbulte, 917 F.2d 1108, 1009 (8th Cir. 1990)) (emphasis added). Kunzer does not allege that the Defendant committed fraud, misrepresentation, or misconduct, but instead contends that the Court committed fraud and misrepresentation. While Kunzer cited only Rule 60(b)(3), relief from a judgment or order may also be granted for “mistake, inadvertence, surprise, or excusable neglect” or for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(1) and (6).

In Pure Country, Inc. v. Sigma Chi Fraternity, 312 F.3d 952 (8th Cir. 2002), the Eighth Circuit reversed the district court’s denial of the plaintiff’s motion to amend the complaint and remanded the matter with instructions to reconsider the motion. The district court ignored the plaintiff’s motion to amend, granted the defendant’s motion to dismiss the original complaint, and then denied the plaintiff’s motion to amend the complaint as moot. Pure Country, Inc., 312 F.3d at 956. The Eighth Circuit found “[t]hat approach, as a procedural matter, was plainly erroneous. If anything, [the plaintiff’s] motion to amend the complaint rendered moot [the defendant’s] motion to dismiss the original complaint.” Id.

Pure Country, Inc. is clearly distinguishable from the case before this Court. Pure Country’s proposed amended complaint contained new plaintiffs and defendants, modifications to the original facts and causes of action, and two new causes of action. Id. at 955. In the case before this Court, Kunzer’s “Amended Petition in the Nature of a Motion for Hearing to Appoint a Judge Pro Tem to Act as Attorney to Prosecute U.S. Attorney” seeks the exact same relief from the same party as his original petition. The only changes in Kunzer’s amended petition is the inclusion of a jurisdictional argument that has no legal merit and an argument based on 18 U.S.C. § 4 regarding the crime of

concealing “knowledge of the actual commission of a felony.”

In Pure Country, Inc., the plaintiff appealed the district court’s order. Kunzer did not appeal from the October 29, 2009 order granting the defendant’s motion to dismiss, nor did he file his Rule 60(b) motion within the time period to appeal. All of the arguments asserted in support of Kunzer’s Rule 60(b) motion could have been raised in a timely appeal. United States v. Mosbrucker, 340 F.3d 664, 665 (8th Cir. 2003). It is well-established that a Rule 60(b) motion may not substitute for a timely appeal. Id. “Thus, where the ‘alleged error could have been corrected by appeal, the motion must be within the time period allowed for appeal, so as to prevent its use as a substitute for timely appeal.’” Chester v. St. Louis Hous. Auth., 820 F.2d 259, 260 (8th Cir. 1987) (quoting C.R.I., Inc. v. Watson, 608 F.2d 1137, 1143 (8th Cir. 1979)).

III. CONCLUSION

The Court, in the exercise of its broad discretion, finds that no exceptional circumstances exist under Rule 60(b) of the Federal Rules of Civil Procedure and **DENIES** the Plaintiff’s “Notice of Motion and Motion to Vacate Judgment” (Docket No. 42). Kunzer failed to appeal the October 2009 order which granted the Defendant’s motion to dismiss. He cannot now attempt to use a Rule 60(b) motion as a substitute for a timely appeal.

IT IS SO ORDERED.

Dated this 19th day of February, 2010.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court